(2)

No. 01-332

Supreme Court, U.S.
FILED
SEP 24 2001
OFFICE OF THE CLERK

In The

Supreme Court of the United States

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY and INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY,

Petitioners,

v.

LINDSEY EARLS and LACEY EARLS, minors, by their next friends and parents, John David and Lori Earls, and DANIEL JAMES, a minor, by his next friend and mother, Leta Hagar,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

STEVEN R. SHAPIRO
Counsel of Record
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
Telephone: (212) 549-2500
Facsimile: (212) 549-2651

GRAHAM BOYD
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
85 Willow Street
New Haven, CT 06511
Telephone: (203) 787-4188
Facsimile: (203) 787-4199

Counsel for Respondents

September 2001

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

2809

QUESTION PRESENTED

The question presented is whether the Tenth Circuit correctly decided that the Fourth Amendment protects students who engage in non-athletic extracurricular activities from a random, suspicionless drug testing policy imposed by the board of education in a high school with a longstanding history of minimal drug usage among its student body generally and where teachers, school administrators, and the board president agree that no documented drug problems exist among the targeted group and where the activities do not pose safety concerns for either the students involved or the public generally.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

Argument 7

Reasons for Denying the Writ 7

I. The Tenth Circuit Correctly Applied The Legal Principles That Have Been Clearly Established By This Court's Legal Precedents In Finding That This Drug Testing Policy, Based On No Evidence That The Targeted Group Engaged In Drug Use Or Posed A Safety Threat, Was An Unreasonable Search Under The Fourth Amendment 8

II. Petitioners Overstate The Conflict Existing Among The Circuits 20

Conclusion 23

TABLE OF AUTHORITIES

Page

CASES

Chandler v. Miller, 520 U.S. 305 (1997) 8, 10, 11, 16, 18, 19

City of Indianapolis v. Edmond, 531 U.S. 32 (2000) 8

Ferguson v. City of Charleston, 121 S.Ct. 1281 (2001) ..8, 13

Gardner v. Tulia Indep. Sch. Dist., 2000 U.S. Dist. LEXIS 20253 (N.D. Tex. 2000) 22

Joy v. Penn-Harris-Madison Sch. Corp., 212 F.3d 1052 (7th Cir. 2000) 21, 22

Miller v. Wilkes, 172 F.3d 574 (8th Cir. 1999), *vacating as moot*, 1999 U.S. App. LEXIS 13289 (8th Cir.) 7, 20

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) 10, 14, 15, 16

New Jersey v. T.L.O., 469 U.S. 325 (1984) 5, 19

Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989) 10, 14, 15, 16

Tannahill v. Lockney Indep. Sch. Dist., 133 F. Supp. 2d 919 (N.D. Tex. 2001) 22

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) 8, 19

Todd v. Rush County Sch., 133 F.3d 984 (7th Cir. 1998), *cert. denied*, 525 U.S. 824 (1998)... 7, 20, 21, 22

Trinidad Sch. Dist. No. 1 v. Lopez, 963 P.2d 1095 (Colo. 1998) 22

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) ..... *passim*

Willis v. Anderson Cmty. Sch. Corp., 158 F.3d 415 (7th Cir. 1998), *cert. denied*, 526 U.S. 1019 (1999) 21, 22

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTION

Amend. IV ..... *passim*

STATEMENT OF THE CASE

Despite a minimal amount of drug use in the district, and virtually non-existent drug use among students involved in non-athletic extracurricular activities, the Board of Education of Tecumseh Public School District chose to adopt the Student Activities Drug Testing Policy. (Petitioner's Appendix [hereinafter "Pet.App."] 14a, 19a). Under the policy, students participating in competitive extracurricular activities must submit to mandatory, suspicionless urinanalysis tests and must also submit a list of medical prescriptions they are taking. (Pet.App. 4a). Although Tecumseh's wide range of activities had previously been open to any students who wished to participate, students in the Academic Team, Band, Choir, Color Guard, Future Farmers of America ("FFA"), and Future Homemakers of America ("FHA"), as well as all athletes, were barred from those activities under the terms of the policy unless they submitted to suspicionless drug testing. (Pet.App. 5a).

Tecumseh High School did not adopt this drug testing policy as a means of addressing a demonstrated drug problem among its student body. Year after year, Tecumseh High School has documented remarkably low levels of illicit drug use among its students in its annual reports to the federal government. (Pet.App. 17a). Only alcohol and tobacco have been identified as significant problems among the student body, and the testing method under the policy does not screen for either substance. (Pet.App. 4a, 17a).

The decision to test students in non-athletic extracurricular activities in addition to athletes was not based on

a concern that these students were in need of special assistance or face the special safety risks that athletes confront. Indeed, the contrary is true. Just as national statistics on drug use among extracurricular students indicate, teachers, administrators, and the school board president of Tecumseh schools all agree that the students participating in non-athletic extracurricular activities are even less likely to use drugs than the student body as a whole. The results of the testing program underscore the virtual non-existence of drug use among non-athlete extracurricular students. Of the 505 students tested under the policy, only three in the high school tested positive – and all of these students were athletes.

Nor do these students face any special risk of physical injury. Unlike athletics, activities such as Choir, Band, Color Guard, Academic Team, FFA and FHA do not involve dangerous acts. Indeed, the risk of injury from participation in these extracurricular activities is even less than the risk associated with some assignments in ordinary curricular classes, such as working with equipment during shop class. (Pet.App. 22a-23a).

Furthermore, unlike athletes, students participating in non-athletic extracurricular activities do not submit to invasive physical exams and do not share rooms for communal undress and showering. (Pet.App. 19a-21a). Indeed, the only characteristic that distinguishes non-athlete extracurricular students from the general student body is that these students must maintain passing grades in order to compete in particular activities, a requirement that hardly differs from the requirements set upon all students in Tecumseh. (Pet.App. 65a-66a, 66a n.33).

The School District's only justification for targeting these students who are the last to be suspected of drug use is that any group in which a large number of students may be found, no matter how unlikely it is that they will use drugs, can be subjected to drug testing as a deterrent measure for the student body as a whole. (Petition 5-6). Although the School District alleges that the issue of drug use among students became suddenly pressing in the year leading up to the adoption of the policy (Petition 4), only two drug-related incidents occurred. One incident involved a student who did not engage in an extracurricular activity and no student was ever associated with the second incident. The only other evidence of alleged drug use at the High School were a few vague anecdotes, several of which allegedly occurred in the 1970s, told by the school board president and three teachers, based often on multiple levels of hearsay or mere speculations about possible drug use among unidentified students. (Pet.App. 17a-18a). Except for two instances spanning over thirty years, none of the evidence remotely implicates non-athletes participating in extracurricular activities with drugs. Lacking any tangible evidence of an alleged drug problem, the District tries to justify the need for the testing policy by the statements of a parent at a school board meeting in February of 1998. However, the parent was only addressing her athlete son's drug problem and her statements are only relevant to drug use among athletes.

Despite the paucity of evidence of drug use, the School District has imposed a policy that significantly impacts a child's experience in school. Students who

refuse to submit to drug testing are denied the opportunity to earn graded class credits, which may be used to raise grades. (Pet.App. 71a-72a). Even absent the academic consequences of the drug testing policy, extracurricular activities have become an integral part of the educational experience of students today. (Pet.App. 21a).

Respondents challenged this policy as applied to all interscholastic competitive activities, except athletics. Respondent Lindsey Earls participates in the school's Academic Team, Choir, Show Choir, and Marching Band. She was selected for random drug testing in early 1999 during which she filled a cup with a urine sample in a bathroom stall while a faculty member waited immediately outside the stall listening for the sound of her urination. Respondent Earls found the experience embarrassing and objects to having faculty members actively listening for the sound of her urination and to the physical procedure of having to put her urine in a cup. She also finds the entire Drug Testing Policy to be offensive and objectionable.

Respondent Daniel James desired to participate in the school's Academic Team during the 1999-2000 school year and was enrolled in the Academic Team class. Respondent James objects to suspicionless drug testing because he believes it interferes with his rights and his privacy. He further believes that giving a urine sample is humiliating and is disrespectful of him as an individual.

The district court relied upon *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995),[1] in which this Court upheld a drug testing policy of athletes that it concluded was narrowly targeted at athletes who acted as the ring leaders of the drug culture in a drug-infested school, faced risk of serious injury during their athletic activities, and had lowered privacy expectations because of physical exams and a practice of communal undress. Despite finding that drug use at Tecumseh schools was not a major problem (Pet.App. 57a), and despite noting many of the significant differences between the student athletes involved in *Vernonia* and the students in this case (Pet.App. 65a, 76a-77a), the district court relied heavily on its concern about the prevalence of drugs in society as a whole and the mere status of the tested individuals as students in finding the drug test at Tecumseh's schools constitutional. (Pet.App. 61a-62a, 77a).

Applying a careful analysis of the legal principles announced by this Court in *Vernonia*, the Tenth Circuit reversed, holding the search to be unreasonable. The Tenth Circuit found that the school context established a special need, consistent with this Court's recognition in *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1984), to dispense with the warrant and probable cause requirements of the

---

[1] *Vernonia* established four criteria under which student drug testing policy would be evaluated: 1) the nature of the privacy interest upon which the search intrudes; 2) the nature and character of the intrusion; 3) the nature and immediacy of the governmental interest at issue; and 4) the efficacy of the drug testing scheme as a means for addressing the drug problem.

Fourth Amendment but retaining the need for individualized and reasonable suspicion before justifying a search. (Pet.App. 9a). After a comprehensive review of the evidence, the Tenth Circuit found drug usage among the targeted students was "negligible" and that drug testing students who are the least likely to use drugs and who do not engage in dangerous activities was unconstitutional.

In establishing the nature of the governmental concerns giving rise to the test, the Tenth Circuit fully recognized the importance of deterring drug use among students in America's schools.[2] (Pet.App. 22a). However, the Tenth Circuit also noted this Court's consistent emphasis of the particular safety hazards faced by the student athletes subject to the *Vernonia* testing scheme. (*Id.*) Finding such hazards absent here, the court did not consider safety a factor sufficient to justify subjecting these students to this drug testing scheme.[3] (Pet.App. 23a). The court further held that where, as here, a comprehensive review of the evidence clearly indicates that drug use among the targeted group is negligible, the

---

[2] Here, the school board did not implement this policy with the goal of deterring drug use *among the students tested*, as petitioners suggest. (Petition 10). The students tested were precisely those known by teachers and administrators to be without need of such deterrence. Rather, they adopted the policy to deter drug use among the student body generally.

[3] The School District exaggerates the evidentiary showing required by the Tenth Circuit to establish a safety concern among the tested group. (Petition 10). The Tenth Circuit, faced with evidence that the vast majority of activities at issue here pose no safety concern whatsoever, found that the scheme "too often" tested the wrong students. (Pet.App. 23a).

immediacy of the governmental concern is significantly diminished and the efficacy of addressing a drug problem by testing the group identified as the least likely to use drugs is minimal. (Pet.App. 24a). In recognition of the decreased governmental concern, the absence of safety risks involved, and the lack of efficacy of testing a group unlikely to use drugs, the Tenth Circuit found this testing scheme unconstitutional under the Fourth Amendment.

ARGUMENT

Reasons for Denying the Writ

Plenary review of this case is inappropriate for two reasons. First, the court of appeals correctly applied the legal principles announced by this Court in *Vernonia* in finding that suspicionless testing of students engaged in non-athletic extracurricular activities for drug use violated the Fourth Amendment. Second, plenary review should not be granted to resolve what the School District overstates as a conflict with either the Seventh Circuit's opinion in *Todd v. Rush County Schools*, 133 F.3d 984 (7th Cir. 1998), or the Eighth Circuit's opinion in *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999). The latter case was later vacated and is thus of questionable legal authority. The former case, which did not undertake an analysis of the *Vernonia* factors, has been seriously criticized within the very circuit which issued it.

I. The Tenth Circuit Correctly Applied The Legal Principles That Have Been Clearly Established By This Court's Legal Precedents In Finding That This Drug Testing Policy, Based On No Evidence That The Targeted Group Engaged In Drug Use Or Posed A Safety Threat, Was An Unreasonable Search Under The Fourth Amendment.

To overcome the Fourth Amendment protections of millions of students in our public schools requires much more than a speculative attempt to deter generalized drug use or a broad desire to convey an anti-drug message used to justify the drug testing policy in Tecumseh schools. Drug testing for all students would run counter to the Court's longstanding promise that "students do not shed their constitutional rights . . . at the schoolhouse door." *Vernonia*, 515 U.S. at 655-56 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). Vital to those constitutional rights is the Fourth Amendment's guarantee that any search of students presumptively must be "based on individualized suspicion of wrongdoing." *Id.* at 653. This Court has narrowly circumscribed the instances where departure from these normal constitutional safeguards is allowed, reserving them for extraordinary circumstances where drug use either reached epidemic proportions or posed a particular and severe danger. *See Chandler v. Miller*, 520 U.S. 305, 314-18 (1997); *see also Ferguson v. City of Charleston*, 121 S.Ct. 1281, 1288 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). Expanding *Vernonia*'s careful analysis to allow drug testing of any group in which a large number of students may be found would render the Fourth Amendment meaningless in the context of public schools.

In evaluating the Tecumseh drug testing policy, the Tenth Circuit underwent a careful and measured analysis of the legal principles announced by this Court in *Vernonia*. In *Vernonia*, this Court identified four factors to be balanced in evaluating the constitutionality of the challenged school drug testing policy: 1) the nature of the privacy interest upon which the search intrudes; 2) the nature and character of the intrusion; 3) the nature and immediacy of the governmental interest at issue; and 4) the efficacy of the drug testing scheme as a means for addressing the drug problem. *Vernonia*, 515 U.S. at 654, 658, 660. Based on this analysis, the Tenth Circuit struck down drug testing for a group of students who are the least likely to use drugs, who have no proven history of drug use, who engage in no dangerous activities, and who attend a school with an overall minimal drug problem. In order to justify a drug testing policy, a school district in the Tenth Circuit must "demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem." (Pet.App. 25a).

Although the School District agrees upon the Tenth Circuit's use of *Vernonia* factors as the applicable legal standard (Petition 19), petitioners nonetheless argue that the Tenth Circuit's decision conflicts with the holding of *Vernonia*. The School District plainly misreads *Vernonia* as standing for the sweeping proposition that suspicionless drug testing of any group of students is allowed, even absent any evidence that an actual drug problem exists

among the tested students, that the group faces any particular safety concerns, or that the testing scheme attacks a drug problem at all.

Each of the School District's disagreements with the Tenth Circuit would render this Court's careful analysis of that case into many wasted words.[4] The holding of *Vernonia* turns upon finding a congruence of at least five factors, which in combination justified suspension of normal Fourth Amendment rules: 1) student athletes were "the leaders of the drug culture," 515 U.S. at 649; 2) these athletes were imitated as role models by other students, *id.* at 663; 3) the rampant and unchecked substance abuse by these athletes fueled an "immediate crisis" in a "drug-infested school," *id.* at 649, 662-63; 4) drug use by these athletes could and did cause severe injury on the playing field, *id.*; and 5) these athletes have even less of a legitimate privacy expectation than other students, because of communal undress and showering required for athletic participation and because athletes are subject to preseason physical exams. *Id.* at 657.

This Court's subsequent references to *Vernonia* underscore the narrow holding of that case. In *Chandler*, the Court wrote that the "immediate crisis" caused by "a sharp rise in students' use of unlawful drugs in *Vernonia* bolstered the government's and school officials' arguments that drug-testing programs were warranted and

---

[4] As the Supreme Court has explained, "the care this Court took to explain why the needs in *Skinner*, *Von Raab*, and *Vernonia* ranked as 'special' " would be "wasted" if other, more generalized concerns could be invoked to justify exceptions to the Fourth Amendment. *Chandler*, 520 U.S. at 322.

appropriate." *Chandler*, 520 U.S. at 316, 319. Here, in contrast, the choir and band members have no history of drug use, engage in no dangerous activities, and give no indication that their social behavior is imitated by other students. In fact, the Tecumseh School Board, by targeting activities such as Band, Choir and Academic Team, have picked the students *least* likely to use drugs, *least* likely to lead to injury, and *least* likely to provoke drug use among other students. The Tenth Circuit strictly adhered to this Court's detailed analysis in *Vernonia* in finding this policy unreasonable under the Fourth Amendment.

In evaluating the privacy expectations of the student-athletes in *Vernonia* schools, this Court emphasized that athletes engage in communal undress and submit to various regulations, including acquisition of insurance coverage, maintenance of a minimum grade point average, and compliance with the coach's rules of conduct, dress and schedule, that diminish privacy expectations among athletes. *Vernonia*, 515 U.S. at 577. The Tenth Circuit correctly found that the privacy expectations of students here are constrained in only "some small way." (Pet.App. 21a). These students do not submit to invasive physical exams and are not required to obtain insurance coverage (Pet.App. 21a), and although not relied upon by the Tenth Circuit, participation in activities such as Choir or Band does not require communal undress. (Pet.App. 20a). The Tenth Circuit then found that voluntary participation in these activities alone does not lower privacy expectations, as citizens voluntarily engage in activities every day – from employment to running for office – without an automatic reduction of their constitutional rights.

(Pet.App. 20a-21a). The only similarity between the students here and the athletes in *Vernonia* is that their conduct is sometimes regulated in a minor manner by the rules set by a coach. (Pet.App. 21a).

As for the character of the intrusion, this Court in *Vernonia* has addressed the degree of intrusion of a well-conducted urine analysis. 515 U.S. at 658. Although not relied upon by the Tenth Circuit, the Tecumseh testing process is more intrusive than the policy in *Vernonia*. Access to the results of the test in *Vernonia* were strictly limited to certain administrators and athletic directors; the Tecumseh policy is not so carefully limited, as the policy allows the results to be revealed to anyone with a "need to know," a term that is not defined in the policy. (Pet.App. 72a). Furthermore, although the Policy purports to protect the confidentiality of the list of medical prescriptions submitted by students, such confidentiality is not respected in practice. For example, a teacher admitted to reading the students' lists of prescriptions and leaving the lists unattended in an unsealed envelope. (Pet.App. 73a).

In evaluating the nature of the governmental concern, the Tenth Circuit adhered closely to this Court's *Vernonia* decision in light of the facts in the Tecumseh schools. Just as in *Vernonia*, the Tenth Circuit acknowledged the general importance of deterrence of drug use in schools, but also recognized that the particular safety concerns related to athletes played a key role in establishing a governmental need sufficient to justify suspension of Fourth Amendment rights in *Vernonia*. (Pet.App. 22a-23a). Unlike *Vernonia*, these safety concerns are

wholly absent for students participating in non-athletic activities such as Choir and Academic Team.

Petitioners complain that the Tenth Circuit requires school districts to demonstrate that the targeted activity must carry a special risk of injury before safety can be considered a governmental concern sufficient to invade the privacy rights of students. (Petition 21). Such a showing, however, is completely consistent with this Court's repeated emphasis of the presence of concrete and particularized threats to safety in its special needs precedents. This Court stressed that the governmental interest in the *Vernonia* drug testing program was justifiable because "the program is directed *more narrowly* to drug use by student athletes, where the *risk of immediate physical harm* to the drug user or those with whom he is playing *is particularly high.*" *Vernonia*, 515 U.S. at 662 (emphasis added). Justice Ginsburg's concurrence again emphasized the unique safety concerns faced by student athletes. *Id.* at 666. And only this past term, Justice Kennedy described *Vernonia* as resting, not merely upon generalized concern for student drug use, but upon the specific harms facing the students actually targeted under the *Vernonia* policy:

> we sustained the [drug testing] policy as furthering . . . the policy's ultimate goal: "deterring drug use by our Nation's schoolchildren," and *particularly by student-athletes, because "the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high."* Id. at 661-662.

Ferguson, 121 S.Ct at 1293 (Kennedy, J., concurring) (emphasis added; quoting *Vernonia*, 515 U.S. at 661-62);

see also Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 628 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 670 (1989).

Where, as here, the vast majority of activities covered by the drug testing policy involve absolutely no safety concerns, the court of appeals correctly discounted such alleged concerns put forward by the district. By so holding, the Tenth Circuit did not, as petitioners assert, completely exclude safety as a legitimate governmental concern. Rather, the decision merely requires that if the purported justification of targeting a specific group for drug testing is based on safety concerns, there must be some demonstration that safety is, unlike here, actually a concern. If general characteristics of the student body as a whole can be used to justify targeting a specific group of students for drug testing, as the School District asserts, all students could be tested, a result which this Court has specifically cautioned against.[5] *See Vernonia*, 515 U.S. at 662, 666.

As for the immediacy of the school's concerns, the School District "readily admit[s]" that a state of rebellion fueled by drug use does not exist in the Tecumseh schools. (Petition 23). The court of appeals correctly emphasized the Supreme Court's repeated references to the serious drug problem among athletes in that case: the

---

[5] The same is true for petitioners' argument regarding the levels of supervision. (Petition 22). In order to justify targeting these students for testing, the Tenth Circuit followed *Vernonia*'s emphasis of the characteristics that *distinguished* athletes from the student body as a whole.

"sharp increase in drug use," "more disciplinary problems," the fact that "athletes were the leaders of the drug culture," the "administration was at its wits end," "a large segment of student body, particularly those involved in interscholastic athletics, was in a state of rebellion," disciplinary actions were "epidemic," there was a "threefold increase in classroom disruptions and disciplinary reports," the staff's direct observations of students using drugs, and a "rebellion fueled by alcohol and drug use." (Pet.App. 55a) (quoting *Vernonia*, 515 U.S. at 648-49). Given the almost complete absence of any drug problem at all in Tecumseh, the court of appeals correctly held that the immediacy of the governmental concern is significantly diminished.

The School District would have the Tenth Circuit dispense with this Court's repeated, consistent findings of a serious drug problem as immaterial to the holding in *Vernonia*[6] and argue that instead, this Court's passing citations to *Von Raab* and *Skinner* justify suspicionless drug testing of students without any documentation of identifiable drug use. (Petition 23). However, the *Vernonia* Court referenced the allowance of the suspicionless searches in *Von Raab* and *Skinner* within the context of describing the immediate crisis existing in the Vernonia

---

[6] The School District attempts to ignore this Court's findings that the drug use documented in *Vernonia* had reached epidemic proportions by referencing the Ninth Circuit's finding that drug use in Vernonia schools was not extensive. (Petition 14 n.17). It is clear, however, that this Court's analysis of the Vernonia testing policy focused on the findings by the district court that the level of drug usage had reached an "immediate crisis" of "epidemic proportions." *Vernonia*, 51 U.S. at 581.

schools, which is, by petitioners' own admission, nonexistent in the Tecumseh schools. A straightforward reading of both *Von Raab* and *Skinner* reveals that neither case stands for the broad invitation to suspicionless searches proposed by the School District. Both *Von Raab* and *Skinner*, unlike the situation here, involved circumstances of extreme threats to safety. *Von Raab*, 489 U.S. at 674 (justifying drug testing based on "extraordinary safety and national security hazards"); *Skinner*, 489 U.S. at 628 (justifying drug testing based on potential for "great human loss" that could be caused by drug-impaired employee); *see also Chandler*, 520 U.S. at 319-22 (emphasizing the special safety context of both cases and further emphasizing documented history of drug use in *Skinner* and *Vernonia* as important to warrant suspicionless drug testing programs). This Court's legal precedent unmistakably relies upon historical drug use among the targeted students as a critical element in its decision.[7]

---

[7] Petitioners overstate the evidentiary requirements announced by this holding in *Earls*. Nowhere does the Tenth Circuit suggest that there be a "fixed minimum quantum of drug use" (Petition 23) before testing may occur. In fact, it explicitly eschewed a "bright-line" rule and instead granted each school district the flexibility and authority to determine when such testing becomes necessary. Nor does the Tenth Circuit require individual detection of actual drug users. (Petition 24). In this case, however, the level of drug use *was* identified among the targeted group and that quantum, universally agreed upon, was negligible.

Nor does the Tenth Circuit require school officials to flout "reason and common sense" to justify a drug testing program. Rather, it found that where, as here, the only evidence of a drug problem rests on anecdotes dating as far back as 1970 and hearsay about the student population at large, students'

Finally, in *Vernonia*, it was "self-evident that a drug problem largely fueled by the 'role model' effect of *athletes'* drug use, and of particular danger to *athletes*, is effectively addressed by making sure that *athletes* do not use drugs." 515 U.S. at 663 (emphasis added). Here, in stark contrast, it is wholly illogical to attempt to address a drug problem by testing those students least likely to use drugs. Indeed, this scheme does not even test for the substances, tobacco and alcohol, that are known to be the most serious problems among Tecumseh students.

Given these facts, the Tenth Circuit's decision that where, as here, the government lacks any special safety concerns, the students tested have been identified as those not likely to use drugs, and the student body in general does not have a problem with drugs, a suspicionless drug testing scheme is unconstitutional, is completely consistent with this Court's *Vernonia* analysis.[8]

---

countervailing Fourth Amendment rights prevent targeting a group of students that have been clearly identified as the least likely to use drugs.

[8] The School District argues that the Tenth Circuit's opinion, in leaving school boards the discretion to evaluate their own drug problems, lacks sufficient guidance in determining when student drug testing is acceptable. (Petition 24). Apparently, the District seeks a bright-line rule, but can propose only the plainly unacceptable line that a school can dispense entirely with demonstrating a cognizable interest in testing based on demonstrated realities. The special needs test turns upon balancing – a concept that is, by definition, fact-specific and that does not lend itself to the kind of rigid certainty petitioners seek.

Not only is the Tenth Circuit's opinion correctly decided under the *Vernonia* balancing analysis, this outcome is also mandated by this Court's subsequent decision in *Chandler v. Miller*, 520 U.S. 305.[9] In *Chandler*, this Court more clearly defined the contours of the special needs doctrine under which the requirement of individualized suspicion may be dispensed with. This Court stressed that the government must *first* make a showing of a substantial special need *before* the government's interests may be balanced against the individual's privacy interests. *Id.* at 318. Where, as here, the government fails to present "any indication of a *concrete* danger demanding departure from the Fourth Amendment's main rule," *id.* at 319 (emphasis added), based on either a documented history of drug use or a substantial public safety threat, or that the test will prove effective in identifying drug use, *id.*, the testing scheme must be struck down, no matter how "well-meant" or "conveniently arranged." *Id.* at 322, 323. Any contrary rule would lead to suspicionless and unfettered drug testing of any citizen with lowered privacy expectations on the flimsiest of excuses.

The students tested under the Tecumseh scheme completely lack any of the attributes that could give rise to special needs under *Chandler*. There exists no documentation of drug use among the tested students, no particular concern over safety, and no effectiveness of a

[9] Although the Tenth Circuit declined to explicitly incorporate *Chandler* in its analysis, the Tenth Circuit's resulting decision, that a school must base a drug testing scheme on "demonstrated realities," is consistent with *Chandler*.

drug test that targets those least likely to use drugs. Indeed, as the School District has admitted in prior proceedings, the purpose of this drug testing program is merely symbolic. However, the lesson of *Chandler* is clear: a desire to convey a symbolic message against drug use is insufficient to establish a "special" need. *Id.* at 321.

Whether under the *Vernonia* or *Chandler* analysis, the mere entrance through the schoolhouse gates does not include the blanket invitation to subject students in America's public schools to drug tests. Following the logic of the School District – that a general deterrence scheme can justify testing any large segment of the student population, with no requirement to establish special safety concerns or an identifiable drug problem among those tested – would lead down a slippery slope until, ultimately, all students would be required to shed their Fourth Amendment protection against unreasonable searches as a condition for entrance to school.[10] Such a condition is clearly impermissible under the Constitution and this Court's longstanding precedent. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

[10] The School District further argues that "local control" of schools justifies suspension of students' Fourth Amendment rights. (Petition 25-26). As this Court has consistently recognized, however, the Constitution protects the rights of students, even against local school officials. *See Vernonia*, 515 U.S. at 652; *T.L.O.*, 469 U.S. at 336-37. In fact, by allowing school districts to determine when a drug test becomes necessary, the Tenth Circuit's decision is respectful of the authority and discretion of local school officials.

II. Petitioners Overstate The Conflict Existing Among The Circuits.

Although the Tenth Circuit opinion departs from the holdings of the Seventh Circuit in *Todd v. Rush County Schools*, 133 F.3d 984, and the Eighth Circuit in *Miller v. Wilkes*, 172 F.3d 574, the School District overstates the degree of the conflict. Other panels in the Seventh Circuit have criticized the earlier holding in *Todd* and the Eighth Circuit has since vacated its decision in *Miller*. By contrast, the Tenth Circuit's opinion lies squarely within the mainstream of judicial precedents in the nation.

In *Miller*, the Eighth Circuit upheld a suspicionless drug testing policy directed at students participating in extracurricular activities despite a finding of no drug use among the student body. In reviewing the *Vernonia* factors, the Eighth Circuit relied only on a general concern about drug use among students nationally to justify the nature and immediacy of the governmental interest. *Miller*, 172 F.2d at 580-82. However, the Eighth Circuit later vacated this decision as moot, *see Miller v. Wilkes*, 1999 U.S. App. LEXIS 13289 (8th Cir.), and therefore this decision is not considered precedent in the Eighth Circuit. *See* U.S. Ct. App. 8th Cir. Rule 28(A)(i).

In *Todd*, the Seventh Circuit upheld a suspicionless drug testing policy aimed, in part, at students involved in extracurricular activities. Based on only a cursory review of *Vernonia*, the *Todd* court upheld the policy on the summary findings that general deterrence served a sufficient governmental interest, that successful extracurricular activities requires healthy students, and that

extracurricular activities were privileges. *Todd*, 133 F.3d at 986-87. However, the soundness of this decision has been significantly questioned within the Seventh Circuit.

In *Willis v. Anderson Community School Corporation*, 158 F.3d 415 (7th Cir. 1998), *cert. denied*, 526 U.S. 1019 (1999), another panel of the Seventh Circuit held that, unlike *Todd*, "simply invoking the importance of deterrence is insufficient. Instead, it is necessary to closely examine both the nature of the government's concern and the efficacy of the policy *in this particular case*. . . . " *Id.* at 423 (emphasis in original). The court specifically warned that "one insidious means towards blanket testing is to divide students into broad categories . . . and then sanction drug testing on a category by category basis." *Id.*

Another panel of the Seventh Circuit, in reviewing its prior decision in *Todd*, severely criticized the holding in *Todd*. Recognizing that *Todd* did not even employ the methodology presented by this Court in *Vernonia*, the panel stated that, but for *stare decisis* considerations, "we would not sustain the random drug . . . testing of students seeking to participate in [non-athletic] extracurricular activities." *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1062 (7th Cir. 2000). Although ultimately upholding a testing program similar to that at issue in *Todd*, the *Joy* court underwent a thorough analysis of each of the *Vernonia* factors. In its review, the *Joy* court repeated the holding in *Willis* that, unlike the holding in *Todd*, general deterrence is simply insufficient to establish a governmental concern warranting the suspension of general Fourth Amendment requirements. *Id.* at 1064. The *Joy* court also found that the lack of correlation between drug use and the students tested as well as the absence of

any safety-related concerns established that the government had not satisfied the immediacy or efficacy factors of the *Vernonia* test. Clearly, after *Joy* and *Willis*, the *Todd* decision stands on shaky grounds even within the circuit that issued the opinion.

As the Tenth Circuit documented, its holding and analysis is consistent with all remaining lower court decisions. *See, e.g., Gardner v. Tulia Indep. Sch. Dist.*, 2000 U.S. Dist. LEXIS 20253 (N.D. Tex. 2000); *Tannahill v. Lockney Indep. Sch. Dist.*, 133 F. Supp. 2d 919 (N.D. Tex. 2001); *see also, e.g., Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095 (Colo. 1998) (applying federal constitution).

CONCLUSION

Certiorari is not warranted. The Tenth Circuit's holding conforms to this Court's legal precedents defining the scope of suspicionless drug testing schemes. The School District proposes a drug testing scheme that would summarily brush aside constitutional protections of students in a manner never imaginable under this Court's rulings. Moreover, given the uncertain legal status of the conflicting circuit decisions, plenary review is not warranted at this time.

Respectfully submitted,

STEVEN R. SHAPIRO
Counsel of Record
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004
Telephone: (212) 549-2500
Facsimile: (212) 549-2651

GRAHAM BOYD
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
85 Willow Street
New Haven, CT 06511
Telephone: (203) 787-4188
Facsimile: (203) 787-4199

Counsel for Respondents

Dated: September 24, 2001